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No. 85-1722

In The
Supreme Court of the United States
October Term, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in applying a least restrictive alternative analysis to determine if a state prison regulation prompted by legitimate penological objectives unconstitutionally restricts inmates' free exercise of religion rights and in requiring proof of actual breaches of security prior to implementing such a regulation?

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THE THIRD CIRCUIT ERRED IN APPLYING A LEAST RESTRICTIVE ALTERNATIVE ANALYSIS TO DETERMINE IF A STATE PRISON REGULATION PROMPTED BY LEGITIMATE PENOLOGICAL OBJECTIVES UNCONSTITUTIONALLY RESTRICTS PRISONERS' FREE EXERCISE OF RELIGION RIGHTS AND IN REQUIRING PROOF OF ACTUAL BREACHES OF SECURITY PRIOR TO IMPLEMENTING SUCH A REGULATION	21
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BRIEF FOR PETITIONERS

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OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey denying respondents' request for injunctive relief and dismissing the complaint is printed in the Appendix to the Petition for Writ of Certiorari (Pet. App. 39-55) and published at 595 *F.* Supp. 928 (D.N.J. 1984).

The opinion of the United States Court of Appeals for the Third Circuit vacating the judgment of the district court is printed in Pet. App. 1-38 and published in 782 *F.* 2d 416 (3d Cir. 1986).

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JURISDICTION

The case was argued before the court of appeals on June 21, 1985. The case was reargued before the court en banc on November 12, 1985 and was decided on January 27, 1986. The petition for writ of certiorari was filed on April 16, 1986 within 90 days of the entry of judgment. The writ of certiorari was granted on October 14, 1986.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 *U.S.C.* § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Title 42 *U.S.C.* § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

> applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. New Jersey Department of Corrections Standard 853 is reprinted in full in the Joint Appendix at 146-58.

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STATEMENT OF THE CASE

1. Respondents initiated a lawsuit for damages and injunctive relief pursuant to 42 *U.S.C.* § 1983 in the United States District Court for the District of New Jersey alleging violations of their First Amendment right to freely exercise their religious beliefs. They specifically alleged that a prison regulation which had the effect of precluding their attendance at a weekly religious service, unconstitutionally violated their right to freely exercise their religion. An attorney was appointed and a hearing held on an order to show cause why a preliminary injunction should not issue restraining the prison officials from limiting respondents' attendance at a religious service. The parties agreed pursuant to *Fed.R.Civ.P.* 65(a)(2) to consolidate the application for preliminary and permanent injunctions as well as the claim for damages.

The district court, per the Honorable John F. Gerry, held that the prison officials had adequately demonstrated that the regulation was necessary to achieve security and rehabilitative objectives and that there was no evidence that the officials had exaggerated their response to these concerns. The court went further and examined each of the alternatives proposed by the inmates. *Shabazz v.*

O'Lone, 595 *F. Supp.* 928, 932-34 (D.N.J. 1984); Pet. App. 53-54. Finding that each alternative posed security problems for the prison, the district court denied the injunctive relief and dismissed the claims for punitive and compensatory damages. *Id.* at 935; Pet. App. 53-55.

On appeal, the United States Court of Appeals for the Third Circuit, after argument before a three judge panel, set the case down for rehearing *en banc* (Pet. App. 156). The court's opinion, over the dissent of Judge Hunter joined by Judge Garth, substantially modified its previous opinion on this issue in *St. Claire v. Cuyler*, 634 *F.*2d 109 (3d Cir. 1980). In that case, the Court held that the test on review is whether the prison regulation has a reasonable relation to the security requirements of the prison. *Id.* at 116. The Third Circuit concluded that prison officials must produce evidence that the exercise of First Amendment rights would potentially jeopardize the security of the prison. *Id.* at 114. As long as their evidence consists of opinions which are arguably correct and sincerely held the regulation is valid unless the prisoners prove that the officials' response is exaggerated. *Id.* at 114-115. The court in *Shabazz* held that its *St. Claire* decision did not embrace this Court's requirement of "mutual accommodation" between constitutional rights and the security needs of the prison as articulated in *Wolff v. McDonnell*, 418 *U.S.* 539 (1974). *Shabazz v. O'Lone*, 782 *F.*2d 416, 419 (3d Cir. 1986). The court concluded that the *St. Claire* test did not provide adequate protection for the free exercise rights of inmates. *Id.* at 417. Rather, the Third Circuit required the prison officials to prove that the regulations "were intended to serve and do serve" the

objective of security and that "no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 *F.*2d at 420 (Pet. App. 9).

In the dissent, Judge Hunter found that the majority opinion was not supported by Supreme Court precedent and that the majority did not give adequate deference to the testimony of the prison officials. 782 *F.*2d at 421 (Pet. App. 12).

2a. Respondents Mateen and Shabazz,* state prisoners housed at the New Jersey State Prison, Leesburg (hereinafter "LSP"), are practicing Muslims. Their religious beliefs require them to attend Jumu'ah, a Muslim service held on Fridays after the sun reaches its apex and before the midafternoon prayer. Such a service is held each week on Fridays at LSP inside the main building from 12:00 noon to 1:00 p.m.

Petitioners are William H. Fauver, Commissioner of Corrections for the State of New Jersey, Edward O'Lone, LSP Superintendent, and James Ucci, Chief Deputy at LSP. Mr. O'Lone has over eleven years of experience with the New Jersey Department of Corrections and has been Superintendent of the prison for five and one-half years (Tr. 149-150).** Chief Ucci has twenty-two years of experience in corrections (Tr. 49). He has been Chief of Security at LSP for five years and prior thereto, served in

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* Shabazz died on January 15, 1986. Mateen was paroled on July 17, 1985.

** References to the pages of the transcript of the hearing held in the district court will be designated "Tr. —."

the same position at the State Prison, Rahway for five years (Tr. 49).

LSP is a medium security state prison located on approximately 1100 acres of land, on which is also situated a separate New Jersey State prison institution, Southern State Correctional Facility (Tr. 64, 66). The prison is comprised of the main prison building and two minimum security satellite units—the Farm and the Ancora Unit. The main prison houses inmates assigned to maximum and gang minimum custody status. The Farm houses only inmates with full minimum custody status. The main prison at LSP was designed to house 504 inmates (Tr. 157). It currently houses approximately 704 inmates (Tr. 67). The Farm was originally designed to accommodate 175 inmates (Tr. 157) and currently houses approximately 500 inmates (Tr. 66, Tr. 157). As a result of this critical overcrowding, pressure and tension built up in the prison facilities* (Tr. 157).

LSP is considered a work institution where goods are produced and services provided (Tr. 152). The institution produces: baked goods for approximately twenty-eight state institutions; meals for its own population as well as the entire population of Southern State; license plates for the entire State of New Jersey; dairy and pork products; clothing for state institutions and lumber (Tr. 152, 161-162). Services provided by LSP inmates include:

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* Since June 1981, the State of New Jersey has been operating under Executive Orders of the Governor because of the seriously overcrowded conditions of the State and county penal institutions (J.A. 159). The Executive Orders permit the Commissioner to designate any place of confinement for any inmate.

farming on the LSP farm and at other institutions, (Tr. 150); wildlife preservation, (Tr. 151); grounds-keeping at LSP and other institutions located in Vineland and Woodbine; highway cleanup along Route 55, (Tr. 154); laundry services at Ancora Psychiatric Hospital; and environmental clean-up projects, (Tr. 156). These projects require inmates to move off of the LSP grounds and into the surrounding communities (Tr. 156). Some inmates are required to travel throughout the State to help load and unload delivery trucks (Tr. 155).

b. State prison inmates are assigned to one of three custody classifications: maximum, gang minimum or full minimum. Pursuant to Department of Corrections Standard 853 (Tr. 166, 170), classifications are made by the Prison Classification Committee (Tr. 168). Maximum custody inmates must be assigned to activities within the confines of the institution (Tr. 166, 270). Gang Minimum inmates must be assigned to jobs which require them to move outside of the security perimeter of the institution within eyesight of an escorting correction officer or civilian supervisor (Tr. 166, J.A. 147). Full minimum prisoners are assigned to jobs or programs outside of the main institution with minimal supervision or to a minimum security unit or both (J. 147).

Assignments to the various custody levels, housing units and jobs are based upon numerous factors including: type of offense; length of sentence; institutional adjustment; disciplinary history; prior incarcerations; psychological profile; and attitude (Tr. 170, J.A. 148-49). Inmates are not assigned to custody levels or jobs based upon their religious beliefs (Tr. 188). The Prison Classifi-

cation Committee does not classify based upon religion and has no way of ascertaining the sincerity of a prisoner's professed religious beliefs (Tr. 178, 188). The only exception is that Muslim inmates are not assigned to the three jobs in the piggery (Tr. 188). There are inmates at LSP who profess to be Muslims in order to be relieved of certain work assignments but who are not sincere in their religious beliefs (Tr. 20, 102). At the time of the district court hearing, there were at least 40 practicing Muslim inmates at the Farm and 61 at the medium unit (J.A. 138-45).

Prior to April 11, 1983, the Department of Corrections Standards permitted the Prison Classification Committee to assign an inmate from maximum custody status directly to full minimum (Tr. 167). On April 11, 1983, Standard 853 was changed to require each inmate to spend a period of time in gang minimum status prior to being given full minimum status (Tr. 166, 167). As a result of this change in the standards new jobs had to be created to accommodate the greater number of inmates assigned to gang minimum status (Tr. 169). Outside work details were established in April 1983 to provide more gang minimum jobs and to relieve the tension and drain on the main prison and at the Farm due to the fact that they housed many more prisoners than they were designed to accommodate (Tr. 157).

c. The idea of allowing gang minimum inmates to work outside on various projects began experimentally in April 1983 (Tr. 156). Traditionally, gang minimum inmates were assigned to positions in the bakery, kitchen or clothing shop and would go outside only to unload de-

livery trucks or pick up supplies, escorted by an officer, and then return through the security gate (Tr. 155-56). By having as many inmates as possible outside during the day, some pressure was taken off the prison facilities such as the gymnasium, the inmate dining hall and the medical service department (Tr. 157). It also relieved tension among the inmates in this overcrowded environment (Tr. 157). The program began with three details with 29 to 41 inmates assigned (J.A. 136). By November 1983, there were 156 gang minimum inmates assigned to 11 details (J.A. 136).

The gang minimum outside work details are assigned to a variety of work projects which require them to be anywhere from one-half mile to two miles beyond the main prison but still on the grounds (Tr. 67, 156, 203-204). Each work detail is comprised of 8 to 15 gang minimum inmates supervised by only one correction officer (Tr. 52). The exact location of the details changes with the needs of the various projects (Tr. 65).

Work details comprised of full minimum inmates are located not only on the grounds of the prison but throughout the State (Tr. 69, 150-55). Beginning on March 5, 1984, there were four highway details which worked along various state highways including the length of Route 55 down to Wildwood and the Garden State Parkway (Tr. 69, 123, 154). Additionally, there are up to 50 full minimum inmates on work release programs who work on jobs in various communities and who are employed by civilian employers (Tr. 173, 183).

The objectives of the prison are: maintaining security; isolating criminal offenders from society; and re-

habilitation (Tr. 165). In order to meet the objective of rehabilitation, LSP's extensive work program is structured as close to the "real world" as possible for the gang minimum and full minimum inmates, *i.e.*, those who are closest to release from prison (Tr. 159-60). The outside work detail job assignments are structured to resemble jobs in free society (Tr. 160). Thus, inmates are required to remain on their jobs throughout the day except for emergency medical problems (Tr. 160).

As the program developed, inmates requested to remain inside the institution rather than report to their outside work assignments for a variety of reasons—to see a doctor, social worker, a member of the administrative staff, to make telephone calls or to attend religious services (Tr. 50, 158). While the records reflect the total number of gang minimum inmates assigned to outside work details, frequently only half of the assigned number would actually go out because they had excuses for not working (Tr. 158). Superintendent O'Lone testified that while the records indicate that 150 inmates may have been assigned to work outside, "I know for a fact that sometimes only 60 or 70 inmates cleared the gates because they had a million reasons why they couldn't go out." (Tr. 158). Moreover, many of the gang minimum inmates who did go out, would request to come back into the institution (Tr. 50). If one inmate on a gang minimum detail has to return to the institution, an officer is required to escort him (Tr. 51, 52) since pursuant to Standard 853, a gang minimum inmate must be within eyesight of a correction officer at all times (J.A. 147). The inmate is brought back to the receiving gate; his identity is checked against his mug shot; he is logged in; and finally he is strip

searched prior to being admitted back into the institution (Tr. 51). Because gang minimum inmates must be supervised at all times, the remaining inmates on the detail have to come back in as well (Tr. 52). Alternatively, an officer would have to be dispatched from another location of the prison and sent out to the detail location to escort the inmate back to the institution (Tr. 53). There was not a sufficient number of correction staff to provide escorts for all of the inmates who requested to return to the institution (Tr. 52-53, 190-91).

The receiving gate, through which the gang minimum inmates were processed to go in and out of the institution is the site of all incoming and outgoing delivery traffic (Tr. 60). All trucks have to be searched prior to being admitted (Tr. 59). When "foot traffic" comes through the receiving gate, such as inmates, all truck traffic is stopped while the inmates are searched (Tr. 60). This results in a back-up of delivery trucks (Tr. 60). Additional truck traffic was coming through the receiving gate because of the opening of Phase Two of the Southern State Correctional Facility and the fact that LSP prepares meals not only for its own inmates but the 1000 inmates at Southern State (Tr. 60). To alleviate the back-up, a separate gate was opened to process the inmates out in the morning and in for the afternoon (Tr. 61). This gate is only open in the morning and afternoon, *i.e.*, when the work details are going out and coming in, and is manned by the officers who supervise the work details (Tr. 61). Any inmates who want to come in during the day must go through the main receiving gate (Tr. 61). The receiving gate is a high security risk area, traditionally a site of escapes in the prison setting, and requires in-

tensive supervision (Tr. 62). It was Chief Ucci's testimony that he had involvement in the aftermaths of three escapes through receiving gates (Tr. 62). Processing inmates back through the receiving gate in large numbers created security and administrative problems for the prison administration (Tr. 68).

At noontime lunch is served to the prisoners inside the main institution *en masse* (Tr. 79). Since the "noon mess" involves a mass movement of inmates, most of the officers are stationed in the mess hall (Tr. 79). The receiving gate is closed during all mass movements because of the greater chance of escape (Tr. 79, 84). Just prior to the noon mess, a security count is taken starting at about 11:30 (Tr. 80). During the count there is no movement at all if possible; each inmate must remain in his cell or dormitory unit to be counted by the officers (Tr. 80). This process takes between 15 and 20 minutes (Tr. 80).

3. From the inception of the gang minimum outside work program, the administration tried to avoid confrontations with the inmates in order to make the program a viable one (Tr. 159). If a confrontation developed, a sit-down strike by the inmates would result, thus effectively destroying the program (Tr. 159). As this was an innovative program in the State prison system, the administration wanted to avoid such difficulties (Tr. 159). Therefore, privileges were initially given to the inmates so they would be motivated to work (Tr. 159). However, adjustments had to be made in order to get any semblance of a productive work day from the inmates and preserve the rehabilitative aspects of the program since too many inmates were avoiding work (Tr. 159). Therefore, the administration systematically eliminated the reasons inmates had to come back inside (Tr. 159). The first change was that lunches were delivered to the work sites so that inmates would not have to come back in to the dining hall at noontime (Tr. 159). The second adjustment was to send the nurse out to the work sites to dispense necessary medication (Tr. 159). The time of doctor call was changed so that inmates could see a doctor other than during the work day.

Finally, the administration instituted a policy that went into effect on March 12, 1984 (J.A. 121). Inmates assigned to work on outside details were required to stay outside during the work day and could come back into the institution only in the event of an emergency. At the same time, those inmates who had been staying inside or nearby the institution on Fridays, could no longer do so if they were gang minimum inmates assigned to outside work details. Appellants, who were assigned to outside work details, were unable to attend the Friday noontime Jumu'ah Service. However, as of May 31, 1984, appellant Mateen was granted full minimum custody status and assigned to a job at the Farm which allowed him to attend Jumu'ah Service (Tr. 31-32).

Prior to implementing the March 12, 1984 policy, all reasons for coming back in during the day were eliminated: inmates could see the doctor, social worker, pick up their store order, make telephone calls, etc., in the late afternoon after they returned from their work assignments (Tr. 160). The administration also consulted with the Islamic spiritual leader, Imam Hamid Abduh, and offered to allow him to conduct Jumu'ah services at any

other time so that the work day would stay intact, unnecessary traffic at the security gate would be eliminated and gang minimum inmates who wanted to could attend (Tr. 184).

Initially, when the administration was trying to make the outside work program more palatable to the inmates, certain gang minimum inmates who professed to be of the Islamic faith, were permitted to work on a detail inside of the security perimeter of the institution on Fridays, which enabled these inmates to attend the noon Jumu'ah service (Tr. 160, 176). These inmates remained in the "max yard" as part of the accommodations made by the prison officials (Tr. 163). However, the administration needed to make that work detail available for maximum security inmates (since the detail was located within the security perimeter) and reassigned the gang minimum inmates to regular outside work projects (Tr. 164). This move was necessitated by the opening of two new correctional facilities in New Jersey: Mid-State and Southern State (Tr. 163). Those institutions were getting the lower risk inmates who previously had been assigned to LSP (Tr. 163). Thus, LSP received more maximum custody inmates, *i.e.,* inmates with longer sentences and more serious criminal records (Tr. 163). These inmates must be assigned to maximum custody status jobs inside the security perimeter pursuant to Standard 853 (J.A. 147). Those who could qualify for gang minimum but were still considered greater security risks, were assigned to those few gang minimum jobs inside the prison (such as the kitchen or the bakery) which require only a minimum amount of movement outside (Tr. 164, 169-71).

Superintendent O'Lone testified that fewer inmates were available to assign to full minimum and gang minimum because of the opening two and one-half months previously of a protective custody unit comprised of 84 inmates (Tr. 200). He also testified that one of the regular units was about to be changed to an administrative segregation unit which would increase the number of inmates who had to be assigned to inside jobs. Moreover, new units were expected to be installed at LSP which would increase the overall inmate count by approximately 160 by the end of 1984 (Tr. 174). Therefore, any current decrease in the number of gang minimum outside work details is only temporary, and the prison must be in a position to accommodate foreseeable changes (Tr. 164).

The gang minimum inmates who were temporarily in the "max yard" on Fridays were reassigned to outside positions for the additional reason that the custody classification of gang minimum requires that these inmates be assigned to positions that routinely require them to move outside of the security perimeter of the institution (Tr. 166; J.A. 147). To permit gang minimum inmates to remain in the "max yard" on Fridays would defeat one of the purposes of having the outside detail work program which was to reduce the pressures on the main unit because of its overcrowded condition (Tr. 176). Furthermore, the administration experienced problems in the past with permitting gang minimum inmates into the institution on Fridays, in that of the number of inmates who requested the privilege, only half of them actually attended the Jumu'ah service (Tr. 181).

Additional problems in permitting certain inmates who professed to be practicing Muslims to remain inside

the medium security facility are: (1) the administration has no way of determining who is a conscientious practitioner and who is not; and (2) it creates an impression amongst the other inmates that a certain segment is escaping a rigorous work detail for the Muslims would only have a four day work week instead of five. These inmates could not be required to work on a Saturday or Sunday because the prison schedule is set up on a Monday through Friday work week (Tr. 179). Likewise, the normal work week for inmates is five days per week, Monday through Friday (Tr. 194). There are a limited number of seven day per week jobs, *i.e.*, Monday through Sunday (Tr. 194). Those assigned to the seven day per week jobs receive additional work credits and wages (Tr. 194).

The prison sponsors recreation and visitation programs on the weekends to reduce idleness and provide relief to the inmates (Tr. 190). These programs require staff supervision, and there are no extra officers available to supervise additional weekend work programs (Tr. 190). Moreover, having a weekend work detail comprised solely of inmates with one particular affinity is contrary to generally recognized, sound prison administration theory and creates a security threat (Tr. 180). Such a situation is known to lead to a challenge to institutional authority and confrontation (Tr. 180).

4. The LSP administration has attempted to accommodate all requests for religious activities (Tr. 92-97; 182-83; 186). Changes in the meal schedules were made during the month of June so that Muslim inmates could celebrate the religious holiday of Ramadan (Tr. 92; J.A. 138-44). The breakfast meal was served earlier to the

participating Muslim inmates and the evening meal was served later than the regular schedule (Tr. 92). The inmates were permitted to participate in congregational prayer each morning and evening throughout the month-long holiday (J.A. 138). Alternatives to pork served at meals are available to Muslim inmates all year (Tr. 93).

The Muslim spiritual leader comes to the medium unit to conduct religious studies on Wednesday evenings and for Jumu'ah on Fridays (Tr. 92; Tr. 196). The LSP Superintendent is more than willing to permit the Imam to come into the institution any day of the week at any time to meet with Muslim inmates and conduct religious services (Tr. 186-87). He is free to conduct another Jumu'ah service on Friday afternoons when all of the inmates have returned to the institution from their outside work details (Tr. 186).

Experience of the Superintendent has shown that Muslim inmates on work-release programs who are employed by civilian employers, do not request to leave their jobs on Fridays to attend Jumu'ah service (Tr. 184-86).

At the Farm, full minimum inmates who are assigned to jobs in and around the compound, may attend the Friday Jumu'ah Service held at the Farm (Tr. 97). Those assigned to outside work details a great distance from the compound must remain at their work sites during the work day except if an emergency arises. The system proposed by appellants of assigning all full minimum Muslim inmates to one or two work details in or near the Farm would result in one or two work details comprised of inmates with one particular affinity. The record testimony from both Chief Ucci and Superintendent O'Lone was that

such a situation invariably leads to a challenge to institutional authority (Tr. 138, 180, 182). Experience has shown that affinity groups of this nature threaten prison security and order (Tr. 138, 180, 182). Moreover, the administration had experience with inmates claiming to be Muslims so that they could avoid the rigorous outside work assignments (Tr. 29, 178-79, 181). Any attempt to assign those inmates who professed to be Muslims to inside work programs is unworkable since the administration is not in a position to question the sincerity of their religious beliefs. Non-Muslim inmates would resent the favoritism shown, *i.e.*, that Muslim inmates would be avoiding the rigorous outdoor work (Tr. 179, 181). An additional reason for this restriction was that too much time was taken out of the limited work day with inmates walking back from job sites located one to two miles from the compound (Tr. 67). It is extremely impractical to drive inmates back to the compound in the middle of the day from work locations scattered throughout the State and from the highway clean-up projects located miles from the institution (Tr. 69-70; 184).

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SUMMARY OF ARGUMENT

The court of appeal's decision departed from Supreme Court precedent based on the erroneous premise that prisoners' free exercise of religion rights are more important than other First Amendment rights or rights founded on the Due Process Clause. The court below required the application of a least restrictive alternative test when analyzing prison regulations which incidentally

impair inmates' ability to freely exercise religious practices. In other analogous cases, this Court has held that a prison regulation must be reasonably related to one of the four legitimate penological objectives of security, deterrence, rehabilitation and isolation. *Bell v. Wolfish,* 441 *U.S.* 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 *U.S.* 119 (1977); *Pell v. Procunier,* 417 *U.S.* 817 (1974). Once the prison officials have met that burden, the burden should shift to the inmates to prove that the officials have exaggerated their response to these problems, (*Pell, supra,* 417 at 827), or that their beliefs were unreasonable. *Jones, supra,* 433 *U.S.* at 128.

The Circuit Court's decision requires proof from the prison officials of a pattern of past breaches of security and ignores the opinions of the state officials as to potential security problems based on past experience. Under the new analysis, prison officials may not implement regulations designed to forestall breaches of security but must wait until a tragedy has already occurred. The new standard gives greater protection to prisoners' First Amendment rights than does the analysis applied by this Court in *Jones, Wolfish,* and *Pell,* but it ignores the fundamental interest that State officials have in administering prisons and protecting inmates and staff alike from potential violence.

The opinion below requires federal judges to do precisely what this Court has cautioned against: substitute their own judgment for that of prison officials. *Procunier v. Martinez,* 416 *U.S.* 396, 405 (1974); *Bell v. Wolfish, supra,* 441 *U.S.* at 547-48. Under the new standard federal judges are forced to assume the role of prison ad-

ministrator and weigh various security threats, administrative problems and rehabilitative concerns in order to determine the most reasonable method of accommodating inmates' rights.

The regulation at issue here did not constitute a flat ban on the exercise of religious beliefs; nor did it completely prohibit the Muslim inmates from participating in a Jumu'ah service. The inmates were provided with a reasonable opportunity to exercise their religious beliefs and were offered an accommodation to hold a Jumu'ah service under conditions that would not threaten security or the rehabilitative aspects of the outside work program. As such, it was error for the Third Circuit to remand for a determination of whether there existed a less restrictive means of accommodating their religious practice.

By requiring prison officials to show that their regulation is reasonably related to legitimate penological goals and upholding such a regulation unless the record demonstrates that the officials' response to security concerns was exaggerated, this Court has previously articulated a standard which allows courts to protect prisoners' rights while permitting State officials to operate state prisons effectively. The Third Circuit erred by departing from this analysis.

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ARGUMENT

THE THIRD CIRCUIT ERRED IN APPLYING A LEAST RESTRICTIVE ALTERNATIVE ANALYSIS TO DETERMINE IF A STATE PRISON REGULATION PROMPTED BY LEGITIMATE PENOLOGICAL OBJECTIVES UNCONSTITUTIONALLY RESTRICTS PRISONERS' FREE EXERCISE OF RELIGION RIGHTS AND IN REQUIRING PROOF OF ACTUAL BREACHES OF SECURITY PRIOR TO IMPLEMENTING SUCH A REGULATION.

A. Deference Must Be Accorded The Determinations Made By Prison Officials in Response to Security, Rehabilitative and Administrative Problems.

1. This Court has in recent years adopted a policy of deference to the expert judgment of prison administrators in making determinations as to how best to maintain internal security within their institutions where such determinations are challenged pursuant to the First Amendment's free speech and associational guarantees (*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 *U.S.* 119 (1977); *Bell v. Wolfish*, 441 *U.S.* 520 (1979); *Pell v. Procunier*, 417 *U.S.* 817 (1974)); the Fourth Amendment's guarantee of privacy (*Bell v. Wolfish, supra*); or the Fourteenth Amendment due process guarantees (*Hewitt v. Helms*, 459 *U.S.* 460 (1983)). In these cases, the Court did not apply the same analysis as in cases involving infringements on the fundamental rights of free citizens. Rather, this Court based its analysis upon the fact of confinement following a valid criminal con-

viction and the State's need for security and order in its correctional institutions.*

The Third Circuit has rejected this Court's policy of deferring to the judgment of those charged with running state prisons and has adopted a standard which requires federal judges to second guess the state officials' decisions by searching for the maximum accommodation for prisoners' rights. In so doing, it has ignored that this Court has articulated different standards applicable in the prison context, based upon the unique and difficult problems in administering prisons and maintaining security therein.

The lower court has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens. That the same standard should apply in the prison setting is contrary to every analogous case decided by this Court to date.

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* For example in *Pell* the Court was faced with a challenge to a California Department of Corrections regulation which prohibited media interviews with specific individual inmates. 417 *U.S.* at 819. The Court upheld the regulation as against the First Amendment challenge based, in part, on the alternative means of communication available. The Court noted that such an analysis would not be applicable to curtailments of the First Amendment rights of free citizens:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 *U.S.* 475, 492, 93 *S.Ct.* 1827, 1837, 36 *L.Ed.*2d 439 (1973). [*Id.* at 825-26].

2a. In recognizing the difference between life in prison versus that in free society, this Court has noted that prisons are "populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance."* *Jones, supra,* 443 *U.S.* at 129. As such, the Court has repeatedly emphasized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 *U.S.* 266, 285 (1948). See also, *Jones, supra,* 433 *U.S.* at 125; *Pell, supra,* 417 *U.S.* at 822.

Indeed, limitations on constitutional rights are "implicit in incarceration." *Jones, supra,* 433 *U.S.* at 125. Even where First Amendment values are implicated, this Court "has repeatedly recognized the need for major restrictions on a prisoner's rights." *Id.* at 129. (Citations omitted). Prisoners do not however, lose all of their constitutional rights because of their conviction and confinement in prison. *Wolfish, supra,* 441 *U.S.* at 545.

Any challenge to a prison policy which has the effect of restricting a First Amendment interest "must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of

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* It is a matter of public record that at the time of the hearing in the district court, respondent Shabazz was serving a life sentence for convictions of murder and that respondent Mateen was serving a thirty to thirty-one year sentence for convictions of kidnapping and weapons offenses in state court concurrently with a sentence for conviction of bank robbery in federal court.

law." *Pell, supra* 417 *U.S.* at 822. In *Pell,* four basic objectives of the correctional system were identified: deterrence of crime; rehabilitation of criminals; protection of society; and maintenance of internal security. *Id.* at 822-23. This last goal of institutional security is the central goal of incarceration and is essential to the achievement of all other correctional objectives. *Id.* at 823. Thus, this Court has held "that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Wolfish, supra,* 441 *U.S.* at 547.

Determinations involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," and federal courts are to defer to prison officials' decisions in these areas unless the record indicates that officials have greatly exaggerated their response to prison conditions or that the response is irrational. *Pell, supra,* 417 *U.S.* at 827.

The requirement that federal courts grant deference to the judgment of prison officials is rooted in the basic premise that "[p]risons, by definition, are places of involuntary confinement of persons who have demonstrated a proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer, — U.S. —,* 104 *S.Ct.* 3194, 3200 (1984). This Court has repeatedly acknowledged that

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 128, *Procunier v. Martinez, supra,* at 404-405, *Cruz v. Beto,* [405 *U.S.* 319, 321 (1972)], see *Meachum v. Fano,* 427 *U.S.* at 228-229.

Wolfish, supra, 441 *U.S.* at 547. Deference is also required not only "because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge," but also because of the inherent nature of the judicial branch as being separate from the legislative and executive branches of government. *Id.* at 548. "(W)here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. *Procunier v. Martinez, supra,* 416 *U.S.* at 405. By requiring the reviewing federal courts to find a "reasonable method" of accommodating prisoners, the circuit court ignored the principle of deference and the underlying bases for it.

The preservation of order and authority are of utmost importance in the prisons because the potential for violence in the prison setting is always present. *Jones, supra,* 433 *U.S.* at 132. Thus, "[r]esponsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Id.* Where, in the informed discretion of prison administrators, there is a potential for danger, limitations on rights may be justified. *Jones* at 133, *n.* 9 citing *Pell v. Procunier, supra,* 417 *U.S.* at 825. Prison officials must be given leeway to implement policies based upon the *potential* for disruption and breaches of security:

As we said in *Rhodes v. Chapman,* 452 *U.S.* 337, 349 n.14 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long standing relations between prisoners and guards, prisoners *inter se,* and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat,* 452 *U.S.* 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution. [*Hewitt v. Helms, supra,* 459 *U.S.* at 474.]

Deference to the expertise of prison officials in implementing policies that in their opinion are necessary to maintain internal order extends not only to measures "taken in response to an actual confrontation" but also to "prophylactic or preventive measures intended to reduce the incidence" of breaches of security. *Whitley v. Albers,* — *U.S.* —, 106 *S.Ct.* 1078, 1085, 89 *L.Ed.*2d 251 (1986).

b. The nature of the constitutional right whether explicit or derived from the due process clause, does not change the nature of the seemingly insurmountable security, administrative and rehabilitative problems which face

state prison officials every day. Even when First Amendment rights of prisoners are implicated, this Court has never used a least restrictive alternative analysis, but has required only that the restriction be rationally related to legitimate institutional goals and not be an exaggerated response to the legitimate security problem. *Jones, supra,* 433 *U.S.* at 127-28. "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Wolfish, supra,* 441 *U.S.* at 543, ***n.*** 25 citing *Vance v. Bradley,* 440 *U.S.* 93 (1979) and *Dandridge v. Williams,* 397 *U.S.* 417 (1970). Prison officials "are not obliged to adopt the least restrictive means to meet their legitimate objectives." *Block v. Rutherford, supra,* 468 *U.S.* at 600 ***n.*** 11.

B. The Lower Court Erred in Adopting a Non-deferential Standard of Review of a State Prison Regulation Which Incidentally Limits Prisoners' Religious Practices.

1a. Despite a fully developed district court record which amply demonstrated the security and administrative problems involved in allowing prisoners to come back inside the prison during the day to attend a religious service (or for any reason), the Third Circuit remanded this case to the district court for determinations of whether *bona fide* security problems and a more reasonable method of accommodating the inmates' religious rights existed. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420, (Pet. App. 9). In effect, the circuit court now calls for the application of a least restrictive alternative analysis, for if courts are required to look for a more reasonable method of accommodating inmates religious practices without jeopardizing

bona fide security concerns, they must determine which alternative imposes the least limitation on those practices. Previously, the Third Circuit recognized that the least restrictive alternative standard "does violence to the wide ranging deference that must be accorded to prison officials and the determination that first amendment values must give way to the reasonable considerations of prison management." *St. Claire v. Cuyler, supra,* 634 *F.*2d at 114. In its departure from *St. Claire* and this Court's line of cases dealing with prison regulations which infringe on inmates' constitutional rights, the circuit court justified the new standard by its perceived meaning of the term "mutual accommodation."* The Third Circuit defined mutual accommodation as requiring that prison officials always find the most reasonable, and in practice the least restrictive, means of achieving the goal of institutional security. While this standard protects fundamental constitutional rights of inmates, it distorts the meaning of "mutual accommodation" and ignores the other fundamental interest at stake—the responsibility that state officials have of maintaining an orderly and secure prison and rehabilitating prisoners in preparation for release.

b. The court of appeals premised its decision on an unsubstantiated "concern" that the standard articulated in *St. Claire v. Cuyler,* 634 *F.*2d 109 (3rd Cir. 1980), did

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* The term was originally used in *Wolff v. McDonnell,* 418 *U.S.* 539, 556 (1974), wherein the Court noted that inmates are "not wholly stripped of constitutional protections," but that these rights are "subject to restrictions imposed by the nature of the regime to which they have been lawfully incarcerated . . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."

not adequately protect the free exercise rights of prisoners. *Shabazz v. O'Lone, supra* 782 *F.*2d at 417(Pet. App. 2). Yet, the standard set forth in *St. Claire* merely established the policy of deference to the expert opinions of prison officials in managing prisons, which was articulated in this Court's decisions in *Wolfish, Jones, Meachum* and *Pell.*

The new standard is also based on other flawed premises. The court of appeals departed from this Court's line of cases requiring deference, reasoning that those cases dealt with other, less important, constitutional rights —not free exercise rights. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420; (Pet. App. 11). Yet there is no basis for establishing a hierarchy of constitutional guarantees in analyzing either the rights of free citizens or of prisoners. *See Nebraska Press Association v. Stuart,* 427 *U.S.* 539, 561 (1976), ("the authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other"); and *Prince v. Commonwealth of Massachusetts,* 321 *U.S.* 158, 164 (1944), (expressing doubt that any of the "great liberties" guaranteed by the First Amendment can be given a higher priority than the others). The court of appeals attempted to justify its least restrictive alternative analysis, a standard which has been repeatedly rejected by this Court,* by stating that this Court's cases requiring deference to the expert opinions of prison administrators did not involve infringements of explicit constitutional guarantees. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420; (Pet. App. 11). Yet, in *Jones* and *Wolfish,*

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* *Bell v. Wolfish, supra,* 441 *U.S.* at 543 *n.* 5; *Block v. Rutherford, supra,* 468 *U.S.* at 600 *n.* 11.

both of which concerned First Amendment rights, this Court adhered to the deference principle.

The majority opinion remanded the case to the district court for further consideration of whether a reasonable method existed for accommodating the inmates' religious practices without creating *bona fide* security problems. 782 *F.*2d at 420; (Pet. App. 9). The factors to be considered upon remand include: crowding in the prison system, costs of implementing accommodations to inmates' religious beliefs, lack of staff, and prisoners' "demonstrated proclivity to unruly conduct . . . ." *Id. n.* 3; (Pet. App. 9-10). All of these factors were developed in the record, and were included in the district court's findings of fact. Chief of Security, James Ucci, with over 22 years of experience in corrections (Tr. 49), testified as to the security problems in bringing inmates back into the institution during assigned work hours and the lack of staff available (Tr. 61-3, 79-81, 84, 87). Further, there was evidence of endemic overcrowding in the New Jersey prison system resulting in the issuance of an executive order by Governor Byrne in 1981 (and continuing every year through the time of the hearing in the district court), declaring a state of emergency in New Jersey's penal institutions (J.A. 159-71). The security problems resulting from the overcrowding, in part, formed the basis of LSP's novel outside work program (Tr. 157). In suggesting that evidence of "inmates' *demonstrated* proclivity to unruly conduct" be considered, the lower court is requiring evidence of past breaches of security, a complete departure from the *Jones,** *Hewitt, Pell,* and *Whitley* cases.

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* "The informed discretion of prison officials that there is *potential* danger may be sufficient for limiting rights. . . ." *Jones, supra,* 433 *U.S.* at 133, *n.* 9.

The record also showed and the district court found as fact,* that the change in Standard 853 mandating a period of time in gang minimum status was instituted by the Department of Corrections because of the security problems experienced when there was a drastic reduction in custody status, *i.e.,* directly from maximum to full minimum. Superintendent O'Lone testified that as a result of the change in the standard, the number of escapes had been reduced. (Tr. 168).

The circuit court, in remanding to the district court to give the prison officials' testimony "due weight," (*Shabazz, supra,* 782 *F.*2d at 420, Pet. App. 10), provides no guidance, as the Third Circuit's *St. Claire* standard did, to trial courts. Ultimate decisions will rest on how much weight a particular federal judge believes should be given to the security and rehabilitative problems identified by the prison officials. Judges must resort to making policy determinations for the prisons. Not only will the new standard result in *ad hoc* decision-making and inconsistent decisions, but will lead to a floodgate of litigation and great uncertainty for prison officials attempting to establish rules and regulations. Every policy and regulation implemented by prison officials will be subject to challenge by prisoners claiming that some more reasonable means of accommodation is possible. The exposure to compensatory and punitive damages and lengthy, expensive litigation will impose unworkable restrictions on the exercise of sound professional judgment since "(a) judge would be unimaginative indeed if he could not come

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* *Shabazz* v. *O'Lone,* 595 *F. Supp.* 928, 929 (D.N.J. 1984); Pet. App. 41.

up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . . ," *Illinois Election Board v. Socialist Workers Party,* 440 *U.S.* 178, 188 (1979) (Blackmun, J. concurring). Thus, under the court of appeals' new standard, if a judge "simply disagree(s) with the judgment of officials about the extent of the security interests involved and the means required to further those interests," he or she can substitute his or her own "unguided" judgment for that of the prison officials. *Bell v. Wolfish, supra,* 441 *U.S.* at 554. The court of appeals completely ignored this Court's holdings in *Wolfish, Pell, Jones, Block* and *Procunier,* that judges should not substitute their judgments for those of the experts. Just because a judge may devise one reasonable way to meet security problems, does not mean that any other choice is unconstitutional.

In addition to maintaining internal order and discipline, prison officials are responsible for rehabilitating inmates to the extent that this is possible. Adequately preparing prisoners for release into society is essential to the prevention of future criminal conduct. For this reason, the LSP officials attempted to provide inmates with "real" jobs in and around the prison and to structure their work day in the outside detail program to simulate the work day in free society (Tr. 152-56, 158-62). Realizing the importance of rehabilitation this Court has identified it as one of the four legitimate penological goals to be considered in determining whether a prison regulation impermissibly infringes upon inmates' rights. *Pell v. Procunier, supra,* 417 *U.S.* at 822-23. By holding that only security problems can justify limitations on prisoners' rights, the Third Circuit usurps one of the responsibilities

with which state prison officials had heretofore been charged.

The Third Circuit, by mandating what in practice is a least restrictive alternative approach, implies that federal judges are more capable than state prison officials of determining the best way to respond to prison security, administrative and rehabilitation problems. The requirement that federal courts determine whether any reasonable alternative exists to accommodate prisoners' rights, calls for federal judges to second-guess the decisions of state officials. Such a standard inevitably requires judges to "become increasingly enmeshed in the minutiae of prison operations," (*Wolfish, supra,* 441 *U.S.* at 562), a practice against which this Court has previously cautioned the lower courts. *Id.* Judges are simply not in a position to fully comprehend the myriad considerations which must be weighed by prison officials in administering state prisons.

The prison officials' determination as to how best to operate their prisons in order to attain the legitimate penological objectives of security, rehabilitation protection of society and deterrence, are now placed under greater scrutiny by the circuit court's decision. The court has signalled to prison officials that judges should impose their own notions of prison management no matter how carefully the officials analyze their security, administrative and rehabilitative problems, no matter how much experience the officials have in prison administration and no matter what efforts they make to accommodate prisoners' rights without jeopardizing institutional objectives. Even prison officials cannot contemplate all of the po-

tential security problems that may develop when instituting an experimental program as was demonstrated at LSP. The Third Circuit's decision completely ignores this fact, and implies that judges are somehow better able to analyze these problems and devise a solution.

Moreover, the new standard forces judges to weigh competing security concerns. The regulation at issue was adopted to meet certain security problems at LSP—allowing inmates to travel throughout the 1100 acres of forest land on which they were working during the day back to the prison unescorted and creating congestion at the security gate, a known security risk because of the possibility of escapes. When a judge examines the circumstances to find a less restrictive way to accommodate the inmates, different security threats become apparent. For example, the proposal that a separate work detail comprised of only Muslim inmates be created as an accommodation raised two different potential security threats—the fostering of additional tensions between Muslim and non-Muslim inmates who could perceive the separate work detail as special treatment for the Muslim prisoners and the formation of affinity groups which invariably challenge institutional authority (Tr. 179-80). Judges are thus put in the position of having to assess the seriousness of the various security threats and of having to provide solutions to the day-to-day problems that arise in prisons. By their experience, State prison officials have a "better grasp" of the numerous problems that they face in maintaining an orderly institution and in deciding what measures are necessary to maintain institutional security. *Bell v. Wolfish, supra,* 441 *U.S.* at 547-48.

c. An obvious result of the application of the lower court's new standard is that prison officials will no longer develop and implement experimental programs designed to achieve security and rehabilitative goals such as the outside work program at LSP. This Court has consistently recognized the importance of federalism in encouraging state experimentation in correctional programs. In defining what process was due to state prison inmates prior to loss of commutation credits, the Court declined to impose demanding rules requiring officials to permit cross-examination of witnesses at disciplinary hearings: "(t)he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of prison officials of state prisons." *Wolff v. McDonnell, supra,* 418 *U.S.* at 569. Noting the fundamental interest that the states have in operating their own prison systems, this Court refused to apply the protections of the Due Process Clause to transfers of prisoners from one prison to another. *Meachum v. Fano, supra,* 427 *U.S.* at 227-28. To hold otherwise would be to "place the (Due Process) Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. . . . The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Id.* at 228-29. (Citations omitted). Federal court intervention discourages state experimentation with novel programs. *See, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 *U.S.* 1, 13 (1979), ("If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may

abandon or curtail parole.") This Court has noted the irony of subjecting to federal court scrutiny those states that have adopted commendable, experimental programs while states that refuse to adopt novel procedures are free from the restraints imposed by the Due Process Clause. *Hewitt v. Helms, supra,* 459 *U.S.* at 471. The federal court intervention required by the Third Circuit's *Shabazz* opinion not only will produce a floodgate of costly and time consuming litigation, but it threatens the values of federalism, which to date, this Court has recognized are served by allowing the states to control state prisons.

2. The court of appeals' decision ignores the fact that the no-return policy did not, in effect, constitute a flat ban on the free exercise rights of these two Muslim inmates. This Court has held that prisoners are to be given a "reasonable opportunity" to practice their religious beliefs, *Cruz v. Beto,* 405 *U.S.* 319, 322 *n.* 2 (1972) (per curiam). The record in this case shows that the inmates were offered the opportunity to participate in a Jumu'ah service on Fridays after they returned from their work sites.* (Tr. 186-87). Furthermore, the record evidence indicated that Muslim inmates were afforded more than a reasonable opportunity to engage in religious practices: they were provided with special meals whenever pork was served (Tr. 93), were provided an Imam who conducts services

* The prisoners return to the institution each day by 3:30 p.m. (Tr. 93). The evidence was vague about the precise hours when Jumu'ah is to be performed, but inmate Mateen testified that the time varied depending upon the time of the year (Tr. 35). Jumu'ah can take place in the summer during a four hour period (Tr. 36). This would give practicing Muslims sufficient time to come in from their work details and attend a later service, at least during certain times of the year.

on Wednesday evenings and Friday afternoons (Tr. 182-83); and the prison rescheduled breakfast and evening meals every day for an entire month during the Muslim celebration of Ramadan. During that month, the Muslim inmates were permitted to gather each morning and evening to participate in congregational prayer (J.A. 138-45). Moreover, as the record reflects, it is contemplated that assignment to gang minimum status will be temporary (Tr. 54). Standard 853 requires "the successful completion of a period of time in gang minimum" status prior to reduction to full minimum status (J.A. 147). The prison's Classification Committee has the discretion to determine how much time an inmate must spend in gang minimum (J.A. 148-49). At LSP, the practice was to require a minimum of 30 days (Tr. 54). If the inmate makes a satisfactory adjustment, he is reclassified to full minimum status, as was the case with plaintiff Mateen (Tr. 23). After his assignment to full minimum custody status at the Farm on May 31, 1984, (Tr. 31), Mateen was free to attend the Jumu'ah service held there. (Tr. 32). Thus, he was only restricted from attending the service from March 12, 1984* until May 31, 1984.

Even those courts which have applied a least restricitve alternative standard to prisoner's First Amendment rights have done so only when the prison regulation prohibits the free exercise right at issue rather than limits it as in the present case. In *Abdul Wali v. Coughlin,* 754 *F.*2d 1015, 1033 (2d Cir. 1985), the court developed a "tripartite standard" for analyzing restrictions of prisoners' rights. The officials are required to adopt the least re-

* The effective date of the no-return policy.

strictive alternative only where the activity sought to be engaged in is not presumptuously dangerous and the regulation prohibits rather than just impairs the means of exercising a protected right. Also, *in Safley v. Turner,* 777 *F.*2d 1307 (8th Cir. 1985), *cert.* granted sub. nom. *Turner v. Safley, — U.S. —,* 106 *S.Ct.* 2244, 90 *L.Ed.*2d 691 (1986), the court applied a least restrictive alternative analysis to a prohibition on inmate to inmate correspondence. The ruling was based upon the finding that the deprivation was absolute and was not temporary. *Id.* at 1312-13. The Eighth Circuit distinguished its earlier decisions in *Rogers v. Scurr,* 676 *F.*2d 1211 (8th Cir. 1982) and *Otey v. Best,* 680 *F.*2d 1231 (8th Cir. 1982), both of which adopted this Court's deference approach as specifically articulated in *St. Claire v. Cuyler, supra.* In *Rogers,* a prison regulation prohibited the wearing of prayer caps and robes outside of religious services thus interfering with Muslim prisoners' religious requirements; and in *Otey,* a Muslim inmate in administrative segregation was prohibited from attending the weekly Jumu'ah service held at the prison with other Muslim inmates. The court in *Safley v. Turner* found that the *St. Claire* deference test was appropriate in those cases since the rules in question were time, place and manner regulations. *Safley v. Turner, supra,* at 1312. Since the inmates in both *Rogers* and *Otey* had other opportunities to exercise their religious beliefs (*i.e.,* they were allowed to pray five times each day, were provided with pork-free diets and were served special meals during Ramadan), the regulations were not subject to the least restrictive alternative test. *Id.* Although it is petitioners' position that the least restrictive alternative standard has no place where legitimate penological

objectives are at stake, this standard certainly does not apply where, as here, the policy being challanged does not constitute a flat ban on the free exercise of religion.

3. The court of appeals least restrictive alternative standard improperly places the burden on the prison officials to prove a pattern of circumstances that threatened security of the institution in order to justify the policy. This directly conflicts with this Court's opinion in *Jones,* where it was held:

> Without a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order."

Jones v. North Carolina Prisoners' Labor Union, Inc., supra, 433 *U.S.* at 127-28.

Petitioners submit that the analysis set forth in *Pell, Jones,* and *Wolfish,* and implemented by the Third Circuit in *St. Claire v. Cuyler, supra,* is the correct legal standard to be applied in determining whether a prison regulation unconstitutionally violates prisoners' First Amendment rights. A regulation must be reasonably related to legitimate penological objectives. *Wolfish, supra,* 441 *U.S.* at 540. If this test is met, the informed discretion of the prison officials governs and not "a court's idea of how best to operate a detention facility." *Id.* at 539. The burden is on the prison officials to show through their expert testimony, that the exercise of First Amendment rights creates a potential threat to the security of the prison. *Jones, supra,* 433 *U.S.* at 128. As long as the

responsible prison officials testify to opinions which are arguably correct and sincerely held, the State has met its burden. *Id.* The regulation will be upheld unless the inmates prove by substantial evidence that the response of the officials is exaggerated. *Pell, supra,* 417 *U.S.* at 827.

This Court's cases and the *St. Claire* test, while according wide-ranging deference to the opinions of prison officials, do not require courts to defer completely.* By placing the burden on prison officials to demonstrate that the regulation is rationally related to the legitimate goals of security, rehabilitation, and internal order, the courts "discharge their duty to protect constitutional rights." *Procunier v. Martinez, supra,* 416 *U.S.* at 405-406. The interest of prisoners in following the dictates of their faiths is protected and guidance is provided to prison officials in implementing regulations while appropriate deference is accorded to their determinations of how best to resolve the urgent problems that confront them daily. *See, Caldwell v. Miller,* 790 *F.*2d 589 (7th Cir. 1986).

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* Total deference is not unprecedented, however. Last term, this Court upheld a military regulation prohibiting the wearing of headgear indoors except by security police. *Goldman v. Weinberger, — U.S. —,* 106 *S. Ct.* 1310 (1986). The regulation precluded petitioner Goldman, an ordained Rabbi and Orthodox Jew who was a commissioned officer in the United States Air Force, from wearing a yarmulke. No security reasons justified the rule. Rather, the rule was upheld based upon the "considered professional judgment of the Air Force (—) that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." *Id.* at 1313. The Court held that the "First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations." *Id.* at 1314.

CONCLUSION

Petitioners respectfully request this Court to vacate the judgment of the Court of Appeals for the Third Circuit and reinstate the judgment of the district court.

Respectfully submitted,

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